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Past, Present and Future Development of the Customary International Law of the Sea and Deep Seabed†

International courts and legal scholars have long recognized that customary international law contains a core of recognized, time-honored rules. They also acknowledge that the formation of customary international law is a growing process. It can grow from claims by one or more nations to new legal rights and the responses to such claims by other nations. The creation of international legal norms by reciprocal interaction between nations is particularly evident in the body of customary law known as the international law of the sea.

International law may grow from negative responses to positive claims, as well as from acquiescence in such claims. The universally accepted principle of freedom of the high seas began with the denial by the Netherlands and other states to broad claims of Spain, Portugal and England to sovereignty over large ocean areas. Through the writings of Grotius and others, freedom of the high sea was asserted as a principle of customary international law, and eventually the interested nations acquiesced in this principle, and refined it.

Since the time of Grotius, the international community has participated in the formulation of rules promoting accommodation of the principle of freedom of the high seas to existing and new uses for the world's oceans.

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Examples of these formulated rules are numerous. The international community has recognized that naval vessels on the high seas may secure required space for military exercises and other activities by giving appropriate signals. Thus, the United States, the Soviet Union and other nations periodically designate certain portions of the high seas for limited periods of time as areas in which various naval exercises or tests will be undertaken. By their responses to such uses, other nations have participated in a process leading to rules governing the circumstances as to when and to what extent and in what manner there is to be no interference with such exercises under customary international law.

Some rules of customary international law applicable to the seas have required centuries within which to become established. Others have grown to maturity less slowly. The world moves faster today. For example, the United States proclaimed in 1945 the establishment of fishery conservation zones contiguous to its coast line in those areas "where fisheries have been or shall hereafter be developed and maintained by nationals of the United States alone . . ."[1] The 1945 proclamation left conservation measures in fishery areas exploited by U.S. and non-U.S. nationals to be established in future international agreements. In this same proclamation the United States provided for the protection of the interests of other states in its fisheries, and agreed to recognize similar conservation zones established by other states provided that the rights of United States fishermen were safeguarded.

Six years after the 1945 proclamation by the United States, at least 13 states had claimed the right to exclusive fishing rights in zones contiguous to their territorial sea. In 1966 the United States established by law a nine-mile fishery zone contiguous to its three-mile territorial sea. In this contiguous zone the United States has "the same exclusive rights in respect to fisheries as it has in its territorial sea . . . ."[2] By 1966, ten states claimed contiguous fishery zones more than three but less than 12 miles wide; 40 states claimed 12 miles; and 19 states claimed more than 12 miles. In that same year, the Legal Adviser of the United States Department of State testified before a Senate committee that the government considered a fishery zone 12 miles from the coast line to be consistent with international law. Thus, unilateral but similar claims to fishery zones by a number of nations, and the acceptance of those claims by other states, led, in only two decades, to a principle of customary international law recognizing the lawfulness of 12-mile fishery zones.

[1] 13 Dept. of State Bull. 484 (1945).

[2] 16 USC §§ 1091-1094. The 1966 legislation makes the United States' rights within this zone "subject to the continuation of traditional fishing by foreign states . . . as may be recognized by the United States."

The international community has not agreed on the precise limits of a coastal state's territorial sea. It has agreed, however, that there are limits. Wheresoever the boundaries may be, there exist areas of the high seas that are outside of the jurisdiction of any nation. At the same time, customary international law recognizes, as we have seen, that nations may have exclusive use of the high seas for certain limited purposes over limited periods of time without violating their obligation to respect the freedom of the high seas.

Customary international law has also evolved rules permitting uses of the resources of the ocean floor beyond national jurisdiction. The best example is the acquisition of exclusive rights over sedentary fisheries such as oysters, sponges, coral, pearls, chanks and beches-de-mer. Claims to these fisheries are currently based on the continental-shelf doctrine, as embodied in the 1958 Geneva Convention on the Continental Shelf. However, prior to that Convention and to the unilateral claims to the continental shelf made subsequent to the Truman Proclamation in 1945, nations had made extensive claims to exclusive rights to exploit these fisheries. The best known examples are the pearling beyond territorial waters by nationals of India, Ceylon, and Australia, and of states along the Persian Gulf and the sedentary fishing rights asserted by Tunis up to 17 miles from its mainland.

The claims by nations to the use of resources adjacent to their coast lines but beyond their territorial waters eventually developed into the doctrine of the continental shelf. When the United States made the first explicit statement of this doctrine in a unilateral claim which has come to be known as the Truman Proclamation of 1945, no state protested, and many emulated it.[3] The international community codified this doctrine[4] in the 1958 Geneva Convention on the Continental Shelf.

As a result of the widespread claims by nations to the continental shelf during the previous two decades, the International Court of Justice was able to state in its 1969 judgment in the *North Sea Continental Shelf* cases, that Articles 1-3 of the 1958 Convention "reflect pre-existing or emergent customary law." The I.C.J. characterized the doctrine of the continental shelf as a "recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one." The Court left to be determined which rights in Articles 1 through 3 were pre-existent or

[3]13 Dept. State Bull. 484 (1945).

[4]The Convention codified the concept that coastal states have certain rights to the resources of the adjacent continental shelf and introduced the concept of exploitability in determining the seaward boundary.

emergent. That coastal states had certain rights to exploit seabed resources adjacent to their coast line the Court seemed to agree had been established. How far out this area of special rights extended was, perhaps, emergent.

The International Law Commission in the commentary on its draft of a convention on the high seas recognized that freedom of the high seas included "freedom to explore or exploit the subsoil of the high seas" including the area beyond national jurisdiction.[5] Article 2 of the 1958 Geneva Convention on the High Seas, which was based on the ILC draft, recognized that freedom of the high seas included the right to the use of ocean spaces for certain enumerated freedoms and others "which are recognized by the general principles of international law . . . ." The Convention provided that all of these freedoms would be exercised by all states "with reasonable regard to the interests of other States in their exercise of freedom of the high seas." In short, Article 2 recognizes the right to engage in various uses of the high seas provided that such uses do not include any claim to sovereignty over high-seas space and that they are carried out "with reasonable regard" to the interest in freedom of the high seas of other states.[6]

While the international community has not agreed on a fixed boundary of the legal Continental Shelf, it is, as stated, agreed that some area of the deep seabed, whatever its extent, is beyond the jurisdiction of any state.[7]

On May 23, 1970, the United States proposed negotiation of a treaty establishing an international régime for the exploitation of the seabed

[5]The Commission's commentary on its draft Article 27, which became Article 2 of the High Seas Convention, indicated that the "list of freedoms of the high seas contained in this article is not restrictive." The Commentary explained that the "Commission has not made specific mention of the freedom to explore or exploit the subsoil of the high seas." The reason for this omission, according to the Commentary, was that "apart from the case of the exploitation or exploration of the soil or subsoil of a continental shelf . . . exploitation [of the high seas soil or subsoil] had not yet assumed sufficient practical importance to justify special regulation." 51 AM. J. INT'L L. 205–06 (1957).

[6]The 1958 Conventions on the Territorial Sea and the Contiguous Zone (Art. 24) and on the Continental Shelf recognized certain special rights of coastal states in contiguous zones of the high seas adjacent to their territorial waters and in their continental shelves beneath high seas.

[7]The existence of this area was referred to in the International Law Commission Commentary on what became Article 1 of the 1958 High Seas Convention. It was expressly recognized in 1968 by the Legal Working Group of the United Nations Ad Hoc Committee to Study the Possible Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, in 1969 by the Permanent Committee on the Possible Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, also in 1969 in the Secretary General's report on the resources of the deep seabed, and in Resolution 2749 (XXV) of the 1970 General Assembly. The last affirmed "that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined."

resources in the area seaward of the 200-meter isobath. On August 3, 1970, the United States submitted to the United Nations Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction a draft convention on the international seabed area. The United States representative described the draft convention in his statement to the Committee as "a further step in a negotiation process." He acknowledged that it could be improved in the course of future sessions of the Committee.

The President's May 23rd announcement recognized that it "may take some time" before a multilateral convention could be negotiated, agreed upon and ratified.[8] The President proposed a policy to be followed in the interim by the United States and other nations interested in exploiting the resources of the deep seabed beyond the area of exclusive coastal state jurisdiction.[9] For an area between the 200-meter isobath and the seaward edge of the continental margin (the "Trusteeship Zone") the President's announcement called for coastal states' special rights but not exclusive jurisdiction; for the area beyond the continental margin, no state would enjoy special rights. This area would be subject only to an international authority. A substantial portion of the revenues collected by the United States during the interim period in the area seaward of the 200-meter isobath would be set aside to be made available, if the Congress approved, to developing nations once a sufficient number of other states adopted an interim policy comparable to that proposed.

All permits or licenses granted for the area seaward of the 200-meter isobath should, the announcement stated, be subject to the multilateral convention to be agreed upon. To reassure investors in a deep seabed

[8]The Convention on the Continental Shelf came into effect for the United States fifteen years after the beginning of the preparatory work in the International Law Commission. The ILC began its preparatory work on the law of the seas in 1949; it rendered its final report in 1956. The Geneva Conference first met in February 1958, and the Convention on the Continental Shelf was signed by the United States in April 1958. The Convention entered into force for the United States in June 1964.

[9]In December 1969, the United Nations General Assembly passed a resolution declaring a moratorium on all exploitation of the resources of the deep seabed beyond national jurisdiction. Although this resolution was passed by a vote of 62-28, with 28 abstentions, less than a third of the member states voting for it were parties to the 1958 Geneva Convention on the Continental Shelf and half of the member states voting against the resolution were parties to the Convention. During the debates on this resolution, the United States representative stated that the prohibition on exploitation in the draft resolution would be "without binding legal effect." One of the cosponsors of the draft resolution, the delegate from Ceylon, concurred in this opinion of the prohibition's legal effect.

The view of the states that supported the Moratorium is, of course, a political fact which must in the opinion of the writer be met with a positive response, *see Testimony Before the Special Subcommittee on the Outer Continental Shelf*, 91st Cong., 1st and 2d Sess. 117, 133 (1970).

project, the announcement stated that the convention should respect the integrity of all permits theretofore issued.

To anyone contemplating investment in a deepsea project, the question at once arises, how can the integrity of permits granted before a multilateral convention has been agreed upon, be assured if they are to be subject to provisions which have not even been tentatively accepted?

The August 3rd draft convention submitted by the United States to the United Nations Seabed Committee had as one of its purposes to help limit the areas of uncertainty. The draft convention also suggests lines which might usefully be followed during the interim period. The task of reconciling the terms of the interim license and the probable permanent one was shown to be manageable.

While the delegates of the many countries with their many different interests debate over the provisions of a multilateral convention, the countries that are now ready and desirous of promoting orderly development of the law for the recovery of the resources of the deep seabed can promote, by parallel legislation, the emergence of customary international law for the deep seabed.

Building on the President's May 23rd announcement, the Congress could enact, with respect to areas beyond the territorial jurisdiction of the United States, legislation prohibiting every person subject to the personal jurisdiction of the United States from interfering with exploitation of the deep seabed being carried on under an exclusive license issued by the United States. The legislation would, of course, not presume to grant licensees any rights as against persons not subject to the personal jurisdiction of the United States. Any person may now carry on activities on the deep ocean floor without a license provided that he conducts these activities "with reasonable regard" to the equal right of others. The purpose of the license would be to give to persons who bind themselves to observe reasonable limitations and conditions as much protection from interferences in the recovery of resources found on or in the deep seabed as the United States has a right to give.[10]

Other nations could pass comparable legislation[11] protecting persons licensed by them from interference by persons under their jurisdiction. If their legislation also protected operators holding licenses issued by the

[10]Licenses issued by the United States to non-nationals would presumably be conditioned upon consent by the licensee to the jurisdiction of the United States for all deepsea mining activities affecting United States nationals.

[11]By legislation is meant any legal arrangement requiring nationals to respect the rights of persons lawfully licensed by a reciprocating state.

United States, our legislation could require persons subject to United States jurisdiction to respect the rights of operators under licenses issued by them.

If the parallel or comparable legislation forbade the granting of a license to persons not under the jurisdiction of one of the cooperating or reciprocating states, a workable régime would come into being without the necessity for any formal treaties or conventions. Non-coastal states could issue licenses under their comparable legislation and participate as fully as the coastal states, and such of the reciprocating states as are still developing countries would be eligible for loans or other assistance from revenues set aside as contemplated in the interim policy proposed by the President.

No state can by itself establish a rule or principle of international law, but any state can sow seeds which can grow into "a general practice accepted as law."[12] Seeds for future customary law to encourage orderly recovery of the resources of the deep seabed can be sown by informing interested nations of an intention to enact legislation which would provide reciprocal benefits to other nations disposed to follow a practice comparable to that we propose.

The principal provisions of such legislation could be along the following lines:[13]

1. The legislation will apply to areas within the Continental Shelf and to areas beyond. It will authorize the issuance of licenses to mine in both areas but the licenses for areas beyond the territorial jurisdiction of the United States will be good only against nationals and others subject to the personal jurisdiction of the United States.

2. Licenses will be limited to persons who are under or who subject themselves to the jurisdiction of the United States, who agree to abide by the restrictions laid down in the Act, and who demonstrate their competence to mine from the deep seabed. The legislation will place limitations on the extent of areas which may be licensed, the length of time for which licenses may be issued and will prescribe other conditions, including work requirements, designed to encourage early and orderly exploitation. In order to encourage exploration, the legislation will require licenses to be issued in the order applied for by qualified applicants.

[12]The Statute of the International Court of Justice directs the Court to apply, inter alia: "(a) international conventions . . . ; (b) international custom, as evidence of a general practice accepted as law; . . ."

[13]The American Mining Congress Committee on Underseas Mineral Resources on January 27, 1971 submitted a statement containing in an attachment suggestions for legislation for the interim period along the lines here proposed. The report was submitted to the Departments of State and the Interior.

3. While the legislation can operate effectively without comparable legislation by other states, our statute should provide for reciprocity with states that by one means or another require their nationals to respect licenses issued by the United States. States having comparable provisions on a reciprocal basis are here called "reciprocating States."[14]

4. Rights of action will be established which may be exercised by Reciprocating States and their licensees against all persons within the jurisdiction of any Reciprocating State who interfere with the rights of a licensee of any Reciprocating State. Rights of action will also be established which may be exercised by any Reciprocating State against any person within the jurisdiction of a Reciprocating State who exceeds rights granted under a license. The legislation will not limit existing rights to carry on scientific research or to explore and exploit the resources of the deep seabed on a non-exclusive basis so long as the exercise of this right does not impinge upon the rights of any licensee.

5. All licenses issued by the United States shall require the licensees to observe general rules issued or subscribed to by the United States to prevent unreasonable interference with other uses of the ocean, to protect the ocean from pollution, to assure the integrity of the investments necessary for the exploitations licensed by the United States or other Reciprocating States, and to provide for peaceful and compulsory settlement of disputes.

6. Applicants, to protect their rights to priority, must notify _____[15] when they file their applications for licenses. Upon issuance of the license the Reciprocating State must also notify _____. No person will be issued a license which impinges upon the rights of any person to exploit an area under license issued by a Reciprocating State. For this purpose a license will be deemed to have been issued on the date of notification of filing of the application.

7. An escrow fund shall be established to become available eventually for assistance to developing Reciprocating States. With the notification of the issuance of a license, the United States (and every other Reciprocating State) shall deposit in its escrow fund $_____for the rights granted to its licensees to exploit each unit quadrangle of the deep seabed area. Annually it shall deposit $_____for such right to each such unit not relinquished.

[14]The legislation will define a "Reciprocating State" as one certified by the Secretary of _____as a state having legislation or state practice or agreements with the United States, which establish an interim policy and practice comparable to that of the United States, including reciprocity of treatment. References to Reciprocating States will include the United States.

[15]An international agency, presumably a specialized agency of the United Nations.

Each Reciprocating State may draw from its fund to the extent necessary to cover any payments it makes to its licensees to reimburse them for losses suffered by interference with the exercise of their rights by a non-Reciprocating State or persons not within the jurisdiction of a Reciprocating State.

8. The United States Licensees will pay a nominal registration fee to the United States. Licensees who are United States citizens, residents or corporations are, of course, presently subject to the income-tax laws of the United States on a worldwide basis. Licensees who are not, will nevertheless be subject to the tax jurisdiction of the United States with respect to their income arising from the exploitation under the United States license. Minerals recovered from the deep seabed area under license issued by the United States will be entitled to free entry into the customs territory of the United States.

9. In conformity with the President's statement of May 23rd, 1970, the proposed legislation will require that all licenses issued during the interim period be "subject to the international regime to be agreed upon" provided that such régime includes "due protection for the integrity of investments made in the interim period," as proposed by the President.

10. While the President's statement seeks to assure that the international régime to be established would "include due protection for the integrity of investments made in the interim period" in the course of the negotiation of a multilateral convention for such an international régime, the government may find it desirable for reasons of high policy to agree to restrictions which impinge upon the rights of operators under licenses issued during the interim period.[16] In order to allow the negotiators the necessary freedom of action, and yet to implement the President's call for protection of investments necessary to finance operators during the interim period, the legislation should provide for insurance analogous to that now issued by the Overseas Private Investment Corporation (OPIC). This insurance would cover losses suffered by U.S. licensees from limitations imposed by or under the international régime.

11. During the period before achievement of a multilateral convention for the international régime, protection for the integrity of investments made in such interim period is required against losses suffered by interference by non-Reciprocating States, or persons not under the jurisdiction of a Reciprocating State, with the exercise of the rights of an operator

[16]For discussion of the need to provide adequate protection for licensees who obtain rights subject to "the international régime to be agreed upon," *see Special Committee on Outer Continental Shelf,* OUTER CONTINENTAL SHELF, 91st Cong., 2d Sess. 28-33 (1970).

licensed by the United States. The legislation should provide that OPIC-type of insurance described in paragraph 10 should also cover losses suffered from such interferences which have not been redressed by actions against the offender, or for which the fund described under paragraph 7 is not adequate.

As the foregoing relates to the area in which no nation would have special rights, any nation that chose could establish practices during the interim period along similar lines. These might well facilitate earlier agreement on the projected multilateral treaty which would substitute conventional law relating to the deep seabed for unilateral reciprocal action by states.

The United States and many other nations wish to restrain unilateral action designed to increase coastal state jurisdiction.[17] While the proposal here made contemplates separate state action, that action is neither for the purpose of enlarging the rights of the state, nor for extending its territorial claims. The interim régime proposed here would not involve any claim by a state to an exclusive right in or sovereignty over areas of the deep seabed. Rather, the action is one of self-limitation. It is consistent with the well-recognized principle of international law that a nation has jurisdiction over its nationals, residents and persons who submit themselves to its jurisdiction. It also protects the interests of the international community in the deep seabed by providing for a mechanism which would allow developing countries to share in the revenues generated by exploitation of the seabed. Finally, from the point of view of the United States, the proposed interim régime would adhere to the principles set forth in the President's May 23rd statement by promoting progress in deepsea mining while discouraging encroachment on the freedom of the seas.

[17]The moratorium resolution passed by the General Assembly in 1969 may have had the effect of encouraging unilateral attempts to increase coastal state jurisdiction. Brazil, for instance, shortly after voting for the resolution, announced that it claimed a 200-mile wide territorial sea.